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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 822

FRANCES UHLHORN,
Petitioner,

vs.

U. S. GYPSUM COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on September 20, 1966 (Petition to Rehear denied October 19, 1966).

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas, Jonesboro Division (R. p. 316) is reported at 232 Fed. Supp. 994. The opinion of the United States Court of Appeals for the Eighth Circuit is as yet unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was made and entered on September 20, 1966 and a copy thereof is appended to this petition as Appendx A at p. A1. Petition to rehear was denied October 19, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1), and under Rule 19 of this Court on the ground that the decision of the United States Court of Appeals in this case is in direct conflict with this Court's decision in *Louisiana* v. *Mississippi*, 384 U.S. 24 (1966).

QUESTION PRESENTED

In this case the thalweg of the Mississippi River changed from one side to the other of a low water sand bar which prior to and at the time of the change in the thalweg was completely submerged at ordinary high water. Plaintiff (Respondent here) contends that this was an avulsion, and therefore that the state line remained in the former thalweg, thus locating the bar (which subsequent to the change in the thalweg became land in place) in the State of Arkansas, under a deed from which state Plaintiff claimed title. Defendant (Petitioner here) contends (under the authority of this Court's opinion in *Louisiana* v. *Mississippi*, 384 U. S. 24 (1966)) that the change in the thalweg was not an avulsion because it occurred entirely within the confines of the bed of the river, and therefore after the change the bar and the land into which it later formed were in Tennessee, under whose laws Defendant claimed the land. The case was tried before a Master, who held with Defendant's contention. The District Court however, while adopting the Master's report,

held as a matter of law with Plaintiff, and the United States Court of Appeals for the Eighth Circuit affirmed. The questions presented are therefore:

1.) Can an avulsion occur entirely within the confines of the bed of a stream and not across or around land in place?

2.) Is the decision of the United States Court of Appeals for the Eighth Circuit in this case in conflict with this Court's holding in *Louisiana* v. *Mississippi*, 384 U. S. 24 (1966)?

STATUTES INVOLVED

The Act of Admission of the State of Arkansas of June 15, 1836, 5 Stat. 50, ch. 100, 1 Ark. Stat. Ann. 1947, p. 297. The text of this Act is set forth in Appendix B at p. A15.

STATEMENT

The Mississippi River is a meandering stream which separates, among others, the states of Arkansas and Tennessee. Ordinarily the boundary between these two states lies in the "thalweg" or main channel of navigation of the river as it existed in 1783 (Act of Admission of Arkansas, June 15, 1836, 5 Stat. 50, ch. 100, 1 Ark. Stat. Ann. 1947, p. 297) "subject to such changes as have occurred since that time through natural and gradual processes." *Arkansas* v. *Tennessee*, 246 U. S. 158 (1918) at p. 177. This has come to be known as the rule of the "live thalweg," and is the generally accepted rule in river cases. The only exception to this rule pertinent here is when the river "suddenly leaves its old bed and forms a new one." *Arkansas* v. *Tennessee*, supra, at p. 173. Under these circumstances the state boundary remains in the old or "dead" thalweg. This is called an "avulsion."

The instant case is a suit in the nature of a suit to clear title brought by Plaintiff (asserting Federal jurisdic-

tion under 28 U. S. C. 1332 based upon diversity of citizenship and the amount in controversy) claiming under a so-called "Island Deed" from the State of Arkansas. However, unless an avulsion occurred, the land in controversy is in the State of Tennessee and not only should Plaintiff's case fail but (this being a local action) the District Court was without jurisdiction to hear the case.

The Master who heard this case made certain findings of fact which the District Court (R. p. 316) and the Court of Appeals approved. The facts can therefore best be stated by reference to that report.

The land here involved first developed as a sand bar in that portion of the Mississippi River known as Centennial Bend some time prior to 1930 (R. p. 269). In that year, it lay between the northwest part of an area known as Brandy Wine Island (in Arkansas) and the east part of area known as Centennial Island (in Tennessee) (R. p. 269). Water flowed upon both sides of it, that between the subject area and Brandy Wine Island being generally called the "pointway channel" while that around the west side of the subject area between it and Centennial Island is generally called the "bendway channel" (R. p. 271). As late as December, 1937, the main channel of navigation of the Mississippi River was through the bendway channel (R. p. 272) although considerable dredging was required to keep it there (R. pp. 270-271). In 1933 an effort was made to open the pointway channel by dredging (R. p. 270) and following the flood of 1937 considerable dredging was done in this channel (R. p. 271). Sometime between December, 1937 and May 6, 1938, the main channel of navigation shifted from the bendway to the pointway channel and never shifted back thereafter (R. p. 272). In the spring of 1938, the pointway channel was marked for navigation by the placing of buoys and lights, and the marks for run-

ning this channel were described and published in the "Notice to Masters and Pilots" by the U. S. Coast Guard. (R., p. 272). Subsequently an entirely new channel developed to the east of the area in controversy so that it is no longer bounded by the active channel of the river; but the development of the latter channel is not relevant to a decision of the issues in this case (R. p. 273).

The controlling question in this case is the nature of the area in controversy at the time when the change in the thalweg or main channel of navigation of the river took place. In this connection it is perhaps best to quote the actual words of the Master:

> "The evidence in this case reflects that the conditions which produced the shift in the channel from the 'bendway' to the 'pointway' developed over a period of several years, and that the eventual shift was caused partly by natural forces attending the flow of the River, and partly by the man made forces precipitated by the dredges of the U. S. Corps of Engineers. The actual shift in the main channel of navigation from the 'bendway' to the 'pointway' occurred within a much narrower space of time." (R. p. 277).
>
> "For purposes of the conclusions reached herein, we have already indicated that May 6, 1938 is the proper date for the shift in channel." (R. p. 297).
>
> "It is my finding of fact that the area had not, as of May 6, 1938, reached a point at which it could be considered above the mark of ordinary high water." (R. p. 299).
>
> "A further reference to the exhibits reveals how low, and how subject to the whims of the River, the area was at the approximate time of the shift." (R. p. 305).
>
> "I am convinced that the area in controversy was still a part of the bed of the Mississippi River at the time of the shift on May 6, 1938." (R. p. 306).

Defendant is unable to reconcile the conclusion of law which the District Court and the Court of Appeals for the Eighth Circuit draw from these findings (that is, that an avulsion *did* occur) with the Master's Report and the conclusion of law which this Court draws from it in *Louisiana* v. *Mississippi*, 384 U. S. 24 (1966) (that is, that under similar circumstances an avulsion *did not* occur). Hence this petition.

REASONS FOR GRANTING THIS WRIT

In its opinion the Court of Appeals for the Eighth Circuit says:

> "We have reviewed all cited cases with interest but find, as did the Master, that none of them involves the identical issue which the facts here present." [Opinion, p. 12]

Petitioner respectfully submits that although this was indeed the situation when the Master made his report, it was not at the time the opinion of that Court was filed, as during the interim the case of *Louisiana* v. *Mississippi*, 384 U. S. 24 (1966) had been decided by the United States Supreme Court. This petition therefore turns upon an interpretation of the holding of that case.

The Court of Appeals' interpretation is reflected in a footnote to the above quotation from its opinion in the present case:

> "At the time of submission, it was thought there was a possibility that *Louisiana* v. *Mississippi*, 384 U. S. 24 (1966), might resolve this problem, but there the Master found that channel movement was by gradual erosion and accretion, and not sudden, perceptible avulsion. The Supreme Court confirmed the Master's report, and thus that case is inapposite." [Opinion, p. 12]

What did the Master actually find the facts to be in *Louisiana* v. *Mississippi*, supra? The following quotation from his report (approved, as noted, by the Supreme Court) will serve to indicate:

> "In the instant case there was a gradual reversal of the trend of erosion and accretion from one side of the river to the other. This reversed trend began not later than 1940 in the area directly below the foot of the cutoff and has continued at all times during the period from that date until 1964. It is true that a great portion of this reversed process occurred during the flood which began in 1950 and the prolonged high water that continued through 1951 and a part of 1952. This is natural, for greater river action always occurs in periods of high water. However, a close study of the Hydrographic Surveys for the years 1932-1964 points out the 'over-all' gradualness of the change in the thalweg south of Glascock Cutoff." [*Louisiana* v. *Mississippi*, Master's Report, p. 20]

What was the situation in the instant case? Again we turn to the Master's Report, for as the Court of Appeals says in its opinion, "The Master made certain findings of fact which the District Court adopted and which we must accept unless they are clearly erroneous." [Opinion, p. 11] Here is his finding upon the gradualness of the process which caused the shift in the thalweg in the instant case:

> "The evidence in this case reflects that the conditions which produced the shift in the channel from the 'bendway' to the 'pointway' developed over a period of several years and that the eventual shift was caused partly by natural forces attending the flow of the River, and partly by the man-made forces precipitated by the dredges of the U. S. Corps of Engineers. The actual shift in the main channel of navigation from the 'bendway' to the 'pointway' occurred within a much narrower space of time." [Record, p. 277]

This, petitioner submits, is a complete parallel to the factual situation in *Louisiana* v. *Mississippi*, supra. In both the overall process was gradual, but a major part of the change took place within a relatively limited time, due to the increased volume of flood waters, the 1937-1938 flood in the instant case playing the part of the 1950-1952 flood in *Louisiana* v. *Mississippi*, supra. Of course, no matter how gradual the process of development, there comes a time when the marked channel shifts as a result of relocation of navigational aids. In *Louisiana* v. *Mississippi*, supra, this was shortly after October 12, 1952 [Master's Report, p. 26]; in the instant case, it was the spring of 1938. [Record, p. 272] As the Master says in the instant case:

> "The weight of the evidence reflects that, as late as December, 1937, the main channel of navigation of the Mississippi River was through the 'bendway' channel. The weight of the evidence also reflects that the channel shifted to the 'pointway' channel between that time and May 6, 1938. The evidence also reflects that the main channel of navigation never shifted back from the 'pointway' to the 'bendway' after May 6, 1938, although navigation was maintained in the former channel for some time only by the use of dredges by the Corps of Engineers." [Record, p. 272]

Under these circumstances, did an avulsion occur? In the instant case, the Master found that it did not. He said:

> "My conclusion of law from the cases is that there cannot be an avulsion within the bed of the river. If I am incorrect in this, then my result is incorrect." [Record, p. 307]

The Master in *Louisiana* v. *Mississippi*, supra, was faced with the same question, which he posed as follows:

> "Can there be an avulsion where the entire change in the channel takes place in the same river bed, leaving no surface land between the two channels?" [Master's Report, p. 17]

This query he answers in the following manner:

> "The Special Master does not find any clear and convincing reason *in the facts and circumstances of this case*, for recommending an extension of a long-established doctrine of avulsion, which has heretofore been limited to the area of the bend of the river that has been cutoff and also to instances in which the stream left its old banks and formed a new bed." [Master's Report, p. 21. Emphasis in original]

By adopting his Report, the Supreme Court has declared this to be the law of the case. And yet, in its opinion in the instant case, the Court of Appeals says:

> "We are also of the opinion that the rule of avulsion is applicable here." [Opinion, p. 13]

By so holding, petitioner respectfully submits that the Court of Appeals is making the very extension of the rule of avulsion that the Master (and, by approving his Report, the Supreme Court) refused to make in *Louisiana* v. *Mississippi*, supra, and that therefore that Court's opinion in the instant case is in conflict with the Supreme Court's opinion in that case. For that Court has held in effect that an avulsion *can* occur within the bed of a river, while the Supreme Court in *Louisiana* v. *Mississippi*, supra, has held that an avulsion *cannot* occur, within the bed of a river. That the change in the instant case *did* occur within the bed of the stream is again established by the Master's Report:

"I am convinced that the area in controversy was still a part of the bed of the Mississippi River at the time of the shift on May 6, 1938." [Record, p. 306]

Neither the District Court nor the Court of Appeals takes issue with this finding of fact. Both, however, differ from the Master in the conclusion to be drawn from it. In its opinion the Court of Appeals says:

"And although the Master found the avultive processes caused the change, he concluded it was not a 'true' avulsion because Massey Towhead at the time of the shift, was not above ordinary high water and, therefore, not land in place. Consequently, the Master concluded that the state boundary shifted as if by erosion and accretion. We do not agree (neither did the District Court) with this conclusion." [Opinion, p. 11]

Yet the position which the Court of Appeals adopts is the very one which Louisiana advanced in *Louisiana* v. *Mississippi,* supra, and which the Master and the Supreme Court rejected. As the Master says in his Report:

"Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.

This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the 'live thalweg' is preferable and will be applied *in all cases,* unless there has been a clear and convincing avulsion. This avulsion must be sudden and perceptible. It is conceivable that the term 'sudden' should be applied in a more flexible sense than its use in ordinary conver-

sation. But even conceding the strength of this argument, we have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court when the river remains in the same bed of the stream. In all such cases the new channel was formed when the river 'suddenly leaves its old bed and forms a new one * * *.' *Arkansas* v. *Tennessee*, 246 U. S. 158, 173." [Master's Report, pp. 19-20. Emphasis in original]

The reference to "facts similar to the instant case," like that in the previous quotation to "the facts and circumstances of this case," must be taken to mean "where the river remains in the same bed of the stream." This fact existed also in the instant case as has been demonstrated. [Record, p. 306] Where these are the facts and circumstances of the case, it makes no difference how rapid or gradual the process may be. For regardless of whether or not the change "insofar as the time element is concerned * * * meets the necessary requirements of an avulsion"* [Record, p. 283] and "even conceding the strength of this argument" there is still no case except the instant case in which an avulsion has been found to exist when the river remains in the same bed of the stream, and in *Louisiana* v. *Mississippi*, supra, the Supreme Court held that under these circumstances an avulsion cannot occur. There is therefore no way of distinguishing that decision from the instant case upon its facts, and they are irreconcilably in conflict in the conclusion of law which they reach.

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*This is apparently the basis of this Court's statement that "the Master found that avultive processes caused the change." Opinion, p. 11.

CONCLUSION

Petitioner therefore respectfully prays that this petition for a writ of certiorari should be granted so that this conflict may be resolved.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 17,896

Frances Uhlhorn, Appellant, v. U. S. Gypsum Company, Appellee.	Appeal from the United States District Court for the Eastern District of Arkansas.

[September 20, 1966.]

Before VOGEL, Chief Judge, VAN OOSTERHOUT and MEHAFFY, Circuit Judges.

MEHAFFY, Circuit Judge.

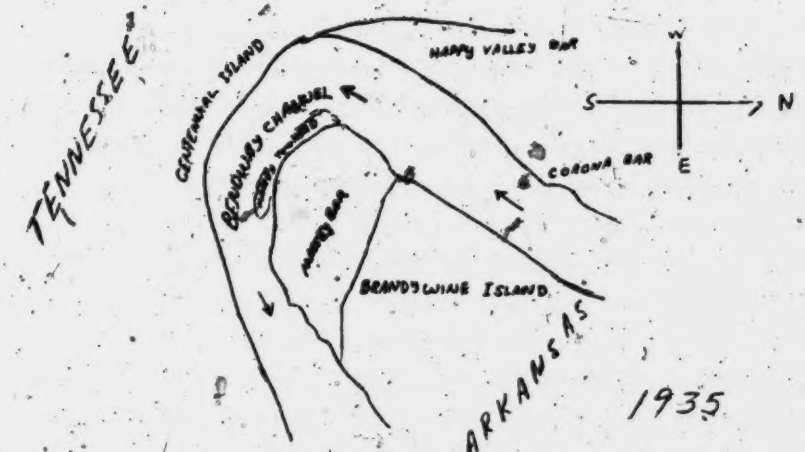
This is an appeal by defendant (Frances Uhlhorn) from a decision of the District Court for the Eastern District of Arkansas holding (1) that certain land which is the subject of this litigation was situated within the State of Arkansas and that the District Court, therefore, had jurisdiction of the subject matter, and (2) that an island deed granted to appellee's (U. S. Gypsum Company) predecessor in title substantially complied with the Arkansas statutory requirements although the legislative enactment authorizing the deed's issuance had been repealed and re-enacted in different form prior to the execution of the deed.[1] We affirm.

1. The District Court's opinion is reported at 232 F.Supp. 994.

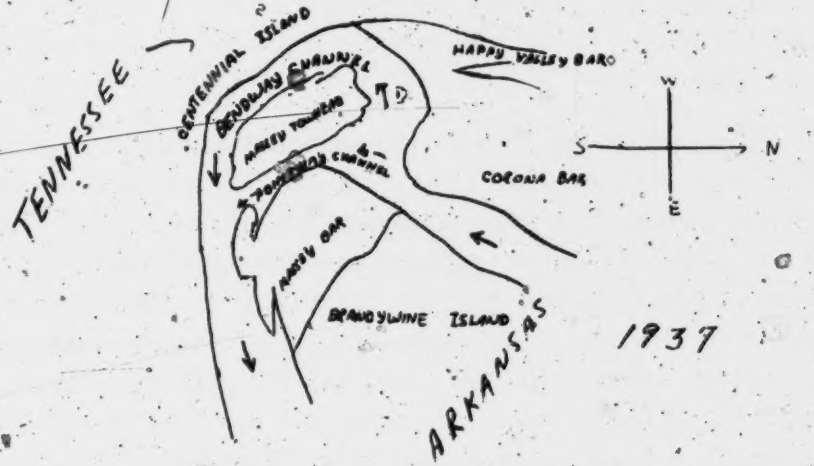
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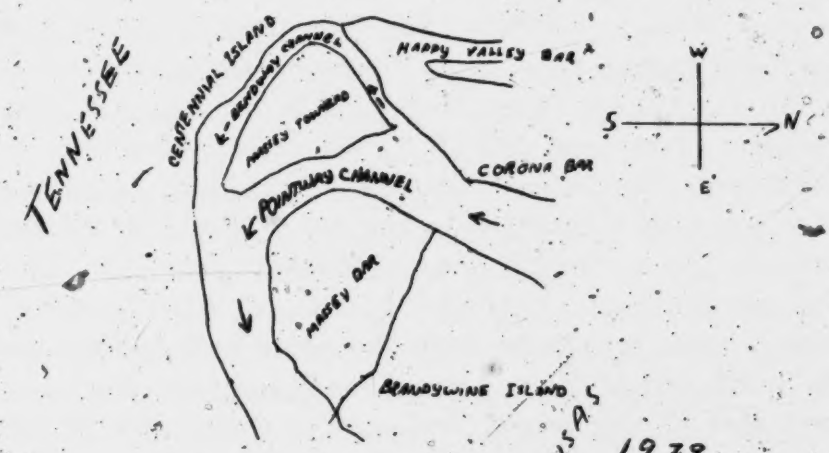
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1935



1937



1939

ARMY CHANNEL OF NAVIGATION

LIVE CHANNEL

The litigation was instituted by Gypsum as a suit to quiet title and necessitated making Uhlhorn a party defendant because she claimed the land in controversy (1) as accretions to property owned by her in Tennessee, and (2) as land adversely possessed longer than the statutory period necessary to perfect her title. A special Master was appointed and it is from his report, the District Court's opinion and the parties' briefs that we summarize and excerpt the following material facts. We select freely from these findings and recitals without documentation. For a clearer understanding of the following narrative, see the inserted drawings depicting the land in controversy and the changing of channels by the river between 1933 and 1939:

The Mississippi River is a migrating, navigable stream with well defined banks on both the Tennessee and Arkansas shores. The main channel of navigation (thalweg) is the boundary between the two states except where the thalweg's action has brought into play certain rules of law as to avulsion or where the thalweg has shifted around an island. Generally, the land on the right descending bank (west bank) is in Arkansas, and the land on the left descending bank (east bank) is in Tennessee. However, because of an avulsion in 1876, Centennial Island on the right descending bank is in Tennessee and Brandywine Island on the left descending bank is in Arkansas. *Arkansas* v. *Tennessee*, 246 U. S. 158 (1918). The area in controversy lies between the well defined banks of the Mississippi as they existed prior to 1930 and is located between the northwest front of Brandywine Island and the east front of Centennial Island. In 1930, the river flowed counterclockwise from the north and east around the north end of Brandywine Island, and then down the west side of that island, and east of Centennial Island.

For some time prior to 1930, the river had been migrating north and west, eroding into the east face of Centennial Island and accreting to Brandywine Island, forming Massey Bar.

The migration constricted the channel creating a swift current and sharp bend so close to the Tennessee shore that tows had to be "broken up" and taken through "piecemeal." To alleviate this navigational hazard, the U. S. Corps of Engineers began extensive dredging operations off the head of Massey Bar and between it and Centennial Island during 1930, 1931 and 1932. Concrete revetments were placed along the Centennial Island bank retarding the erosion into Centennial Island and the accretion to Massey Bar. This main channel of navigation between the Massey Bar accretions and the Centennial shore was known as the "Bendway Channel" and was the boundary between Tennessee and Arkansas. The dredge spoils from the Bendway were discharged downstream from the cut on the outboard or distal end of the nucleus accretions to Massey Bar in the geographic area now occupied by the lands in controversy. In 1933, the Engineers attempted to open a channel across the accretions to Massey Bar between the area in controversy and the Arkansas mainland on Brandywine Island. This was the first manmade attempt to open what is hereinafter referred to as the "Pointway" Channel. Again, all dredge spoil was deposited on the land in controversy which lies between the Bendway Channel and what was later to become the Pointway Channel. Dredging was continued in 1934 and in 1936 another attempt was made to open Pointway across the Massey Bar accretions although river traffic was continuously routed through the Bendway where some maintenance dredging was conducted. In 1937, the Engineers again attempted to dredge the Point-

way Channel between the area in controversy and the natural Bendway Channel by pumping the dredge spoil into the mouth of the Bendway to erect a sand dam between the head of Massey Bar and the Tennessee shore and concentrate the entire flow of the river through the artificial Pointway Channel. The dam was unsuccessful and navigation continued through the Bendway although a volume of water had been diverted through the Pointway and was gradually increasing. All efforts thus far to establish the Pointway as the major channel of navigation were unsuccessful and the latest available charts prepared by the Mississippi River Commission and the navigation instructions issued by the United States Coast Guard to Masters and Pilots navigating the Mississippi indicated that, at least through December, 1937, the main channel of navigation was still in the Bendway between the land in controversy and the Centennial shore.

Following the flood waters of 1938, however, the river abandoned the Bendway and for the first time voluntarily adopted the Pointway as its main channel. The Master found the shift in the thalweg to have occurred sometime between December, 1937 when the main channel was still through the Bendway and May 6, 1938 when the Engineers notified Masters and Pilots of the shift in channels and equipped the Pointway with navigational aids. Even after May, 1938, the Bendway maintained a relatively deep channel and was used by river traffic.[2] As late as

2. Excerpt from Master's report on motion to dismiss:

"At the beginning of the low water season of 1938, the 'pointway' channel was marked for navigation by the placing of buoys and lights, and the marks for running this channel were described and published in the 'Notice to Masters and Pilots' by the U. S. Coast Guard.

"During the early part of September, it became necessary to reopen the natural 'bendway' channel. After dredging, navigation was maintained in the 'bendway' channel until 1939.

1938, there were depths at certain points in the Bendway of 25 feet. Navigation was routed through the Pointway Channel during 1940 and 1941 and additional spoil was placed at the head of the old Bendway in an effort to seal and stagnate it and concentrate all of the flow through the Pointway Channel.[3] The main channel of navigation never returned to the Bendway, although at the last available sounding it remained deeper than the Pointway.

Having been severed from its parent, the Massey Bar accretion to Brandywine Island, the land in controversy was now bounded on the east by the new and vigorous Pointway Channel and on the west by the old and stagnating Bendway Channel. It had become a sizeable land formation composed largely of dredge spoil and was identified by witnesses as Massey Towhead, Happy Valley Bar, Uhlhorn Bar, Lower Corona Bar and Willow Bar. It is hereinafter referred to by us as Massey Towhead.

"Navigation was maintained in the 'pointway' channel during 1939 by the dredging of 162,107 cubic yards of materials. The division of flow around Massey Towhead was causing a filling of the natural channel north of the Towhead. In May, the Engineers Department Survey steamer Griffith, found minimum depths of 25 feet in the old bend and 33 feet in the 'pointway' channel.

"Traffic was maintained through the 'pointway' channel during 1940, and during that time 555,741 cubic yards of materials were dredged. Part of this was placed in the head of the old 'bendway' channel in an effort to close off its flow and concentrate an undivided river through the 'pointway' channel. The abandoned bend was not sounded during the year. Navigation was routed through the 'pointway' channel during 1941 without the aid of dredging. Records of depths in the 'bendway' channel were not kept in 1941 or for any year thereafter. The old 'bendway' channel had been abandoned, although water continued to flow through it for some years thereafter."

3. The life of the Pointway Channel was relatively short as during this period the river was developing a new channel to the east through Brandywine Chute. This later channel was the main stream of navigation at trial date but such is not relevant to this decision as only the change of the channel from the Bendway to the Pointway concerns us.

We must initially dispose of Uhlhorn's challenge that the District Court, and consequently this court, was without jurisdiction to hear this case as Massey Towhead was an accretion to Corona Bar in Tennessee, and therefore lay beyond the territorial limits of the District Court. This challenge having been made, the District Court determined that Massey Towhead was within the Eastern District of Arkansas and, therefore, the court had jurisdiction of the subject matter. Clearly, the District Court had the power to make such a determination and we as a reviewing court have jurisdiction to examine the District Court's finding concerning the extent of its territorial jurisdiction. *Davis* v. *Anderson-Tully Co.*, 252 F. 681 (8th Cir. 1918). Also, the issues here do not involve the changing or establishing of the boundary line between sister states so that original jurisdiction lies with the Supreme Court of the United States. *Virginia* v. *Tennessee*, 148 U. S. 503 (1893). We simply decide the location of an established boundary. *Iselin* v. *Meng*, 269 F.2d 345 (5th Cir. 1959), cert. denied, 361 U. S. 913 (1959).

The boundary between Arkansas and Tennessee, in the immediate area involved in this litigation, was settled by the Supreme Court in *Arkansas* v. *Tennessee*, supra, where the Court concluded that:

> "(1) The true boundary line between the States, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes.
>
> "(2) By the avulsion of 1876 the boundary line between the States was unaffected, and remained in the middle of the former main channel of navigation, as above defined.

> "(3) The boundary line should now be located according to the middle of that channel as it was at the time the current ceased to flow therein as a result of the avulsion of 1876." *Id.* at 177.

Once established, the boundary remains the thalweg or center of the main channel subject to its gradual migration through erosion and accretion. The crucial issue in this case is, therefore, whether the state boundary shifted from the Bendway to the Pointway by reason of the avultive processes that created Pointway.

Our problem requires an examination of three rules of law well established in this country. They are (1) the rule of the thalweg; (2) the rule of avulsion; and (3) the island rule. The rule of the thalweg holds that where a navigable river is the boundary between states, the true line is the middle or thread of the main channel of the river. *Iowa* v. *Illinois,* 147 U. S. 1 (1893). Later cases affirmed *Iowa* v. *Illinois* and treated the question as settled. *Arkansas* v. *Tennessee,* supra; *Washington* v. *Oregon,* 211 U. S. 127 (1908); *Louisiana* v. *Mississippi,* 202 U. S. 1, 49 (1906). The thalweg rule acknowledges a change in boundary only if accomplished by the slow; gradual, imperceptible or insensible, processes of erosion and accretion.

The rule of avulsion is also settled and was articulated by the Supreme Court in *Nebraska* v. *Iowa,* 143 U. S. 359, 361 (1892):

> "It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. . . . 'But if the change is violent

and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.' (Citing Gould on Waters § 159 and cases.)

". . . Accretion, no matter to which side it adds ground, leaves the boundary still the centre of the channel. Avulsion has no effect on boundary, but leaves it in the centre of the old channel."

See also *Missouri* v. *Nebraska*, 196 U. S. 23, 35 (1904), where a portion of the above excerpt was quoted with approval.

The island rule is an exception to the accretion and thalweg rules in that the thalweg of the original channel remains the boundary between the states even though it migrates slowly and imperceptibly from one side of an island to the other. This exception to the rule of accretion appears to have been first mentioned in *Missouri* v. *Kentucky*, 78 U. S. 395 (1870), and defined by this court in *Davis* v. *Anderson-Tully Co.*, supra:

"The general rule is: (1) That, where the main channel of a navigable stream is the boundary between two states and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; and that (2) where it changes by the sudden and violent process of avulsion, the boundary remains where the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. (Citations omitted.) But the first clause of this rule was made to govern and is applicable to cases where, by the slow and natural processes of accretion and erosion, the main channel creeps over the land between its old and its new course. To the rule stated in this clause there is a

well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel became the main channel of navigation. (Citations omitted.)" *Id.* at 685.

To the same effect, see *Commissioners* v. *United States*, 270 F. 110, 113, 114 (8th Cir. 1920) and cases therein cited.

The difficulty in this case lies not in the understanding of or agreement with the general rules but rather in their application to the facts here presented. The Master made certain findings of fact which the District Court adopted and which we must accept unless they are clearly erroneous. *Transportation Ins. Co.* v. *Hamilton*, 316 F.2d 294, 296 (10th Cir. 1963); *H. F. Wilcox Oil & Gas Co.* v. *Diffie*, 186 F.2d 683 (10th Cir. 1950); *Howard Industries, Inc.* v. *Rae Motor Corp.*, 293 F.2d 116, 117 (7th Cir. 1961); *Dyker Bldg. Co.* v. *United States*, 182 F.2d 85 (D. C. Cir. 1950).

The evidence was conflicting as to the character and elevation of Massey Towhead at the time the river abandoned the Bendway and selected the Pointway as its main channel. The Master found that Massey Towhead was a sizeable land formation attached to the Arkansas shore

by a low water sand bar but that at the time of the shift in the channel the area was some four feet below the ordinary high water level.[4] The Master found that it was not eroded by the river but continued to grow by accretion until the change in channels. And although the Master found that avultive processes caused the change, he concluded it was not a "true" avulsion because Massey Towhead, at the time of the shift, was not above ordinary high water and, therefore, not land in place. Consequently, the Master concluded that the state boundary shifted as if by erosion and accretion. We do not agree (neither did the District Court) with this conclusion. Although the Master's report indicates that he did a tremendous amount of research on the legal issue involved, he frankly stated that he had been unable to find one decision which passed squarely upon the point in this case so as to support his conclusion. We have been favored in this case with excellent briefs by both parties, and each presents arguments both vigorous and persuasive. Both parties cite numerous cases and counsel differ radically on the interpretation of the decisions. We have reviewed all cited cases with interest but find, as did the Master, that none of them involves the identical issue which the facts here present.[5] In the usual case of avulsion, land is severed and new banks are formed which enclose the river's new bed. And, in each of the island cases there seems to be no question but that the area in controversy had reached the

4. Plaintiff asserts that at the time the land was approximately one and one-half miles in length and one mile in width. The deed at the time of its issuance conveyed to plaintiff's predecessor 705.30 acres lying above high water mark.

5. At time of submission, it was thought there was a possibility that *Louisiana* v. *Mississippi*, 384 U.S. 24 (1966), might resolve this problem, but there the Master found that channel movement was by gradual erosion and accretion and not sudden, perceptible avulsion. The Supreme Court confirmed the Master's report, and thus that case is inapposite.

elevation of ordinary high water and could technically be classified as an island.

We do not cite any of these many cases because we do not believe any is controlling or even persuasive upon the decision here.

We do not think that where a state's boundary is fixed by a navigable river, such boundary can or should be changed by any action of the river except by the gradual and imperceptible process of erosion and accretion, and this we believe to be logical regardless of how the boundary happened to be originally located in the thalweg of the river. To hold otherwise would alter the scope of the doctrine of accretion as well as do violence to the teachings of the Supreme Court. This we have no right to do. A state's boundary should not be cavalierly changed simply because the process through which the river seeks a new channel cannot be considered as "true" avulsion. In most instances where a river changes by avultive processes, it has left intervening land above high water mark, but we do not think the elevation of the land mass between an old channel and a new one that is cut by avultive processes is a decisive criterion for a change in a state boundary. By all logic and reason, the boundary should not and does not change from the original thalweg except as the Supreme Court said in *Arkansas* v. *Tennessee*, supra, "by gradual process." Since there was admittedly nothing gradual here, we conclude and believe that *Arkansas* v. *Tennessee*, supra, commands that the boundary remains in the thalweg of the Bendway Channel subject to its erosion and accretions occurring prior to its stagnation and death.

We are also of the opinion that the rule of avulsion is applicable here. Massey Towhead was on May 6, 1938 a massive land mass although infrequently submerged by

some four feet when the river reached ordinary high water. Massey Towhead was not only massive but solid and compact. It resisted all efforts of the Corps of Engineers to dredge a channel across it. Furthermore, after the Engineers abandoned their intensive efforts, it remained intact after the flood of 1937. It was not until after the revetment of the Tennessee side and the flood of 1938 that the river adopted the Pointway Channel. Massey Towhead remained as it was after the channel change. It was as discernible, intact and identifiable after the channel change as it was before. It did not suffer erosion. Under the facts, it would be completely illogical to conclude that the rule of avulsion does not apply simply because the identifiable land was not above the high water mark.

We are not impressed with the "island" rule argument. It is not applicable here as it only applies to maintain the boundary in case of a slow and gradual change in the thalweg. The change here was sudden, and in no sense gradual.

Thus, we are convinced that no established rule requires or even permits a change in the state boundary here. If it were necessary to adopt a new rule of law, it should favor the continuation of the long existence of the state boundary rather than a change therein.

Other subsidiary issues are raised and we have carefully considered each, but conclude that an extensive discussion is not warranted. Uhlhorn, for example, contends that the land in controversy was originally a bar in the Mississippi and an accretion to Centennial Island, but the Master found upon substantial evidence that although there had been a bar in front of Centennial Island, it was completely eroded and never reappeared, and that the area in controversy was in fact at all times land connected

with the Arkansas mainland and on the Arkansas side of the Bendway Channel. We find no merit in Uhlhorn's contention that the state boundary changed by the doctrine of acquiescence.

Additionally, Uhlhorn challenges the validity of the deed to Gypsum's predecessor in title but we find no merit in this contention, and since a discussion would be of no value precedentwise we are content to adopt the conclusions reached by the District Court and for the reasons therein stated.

By reason of our views herein expressed, the judgment of the District Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

ACT OF ADMISSION OF ARKANSAS

June 15, 1836, 5 Stat. 50, Ch. 100, 1 Ark. Stat. Ann. 1947, p. 297

Whereas, The people of the Territory of Arkansas did, on the thirtieth day of January, in the present year, by a convention of delegates called and assembled for that purpose, form for themselves a Constitution and State government, which Constitution and State government, so formed, is republican; and,

Whereas, The number of inhabitants within the said territory exceeds forty-seven thousand seven hundred persons, computed according to the rule prescribed by the Constitution of the United States; and the said convention have, in their behalf, asked the Congress of the United

States to admit the said Territory into the Union as a State on an equal footing with the original States:

The State of Arkansas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever; and the said State shall consist of all the territory included within the following boundaries, to-wit: Beginning in the middle of the main channel of the Mississippi River, on the parallel of 36 degrees north latitude; running from thence west with the said parallel of latitude, to the St. Francis River; thence up the middle of the main channel of said river to the parallel of thirty-six degrees thirty minutes north; from thence west to the southwest corner of the State of Missouri; and from thence to be bounded on the west to the north bank of the Red River by the lines described in the first article of the treaty between the United States and the Cherokee Nation of the Indians west of the Mississippi, made and concluded at the City of Washington on the twenty-sixth day of May, in the year of our Lord one thousand eight hundred and twenty-eight; and to be bounded on the south side of Red River by the Mexican boundary line to the northwest corner of the State of Louisiana; thence east with the Louisiana State line to the middle of the main channel of the Mississippi River; thence up the middle of the main channel of the said river to the thirty-sixth degree of north latitude, the point of beginning.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 822.

FRANCES UHLHORN,
Petitioner,

vs.

UNITED STATES GYPSUM COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States.

RESPONDENT'S BRIEF IN OPPOSITION.

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RESPONDENT'S BRIEF IN OPPOSITION.

THE ISSUE PRESENTED.

The Petitioner seeks certiorari in this Court on allegation that the opinion of th United States Court of Appeals in the case at bar is in irreconcilable conflict with the Master's Report approved by the United States Supreme Court in the case of **Louisiana v. Mississippi**, 384 U. S. 24 (1966).

The Petition asserts that the Master's Report approved a rule that an avulsion occurring within the riparian banks of a river around lands which had not arisen to

highwater mark did not invoke the legal consequences of an avulsion.

The Respondent answers that there is no conflict between the report of the Master and the opinion of the Court of Appeals because the factual situations in the two cases are materially different. The Master in **Louisiana v. Mississippi**, supra, did not have before him the question presented to the Circuit Court of Appeals below. In particular, the Respondent contends that the changes of the channel in **Louisiana v. Mississippi** occurred entirely by erosion. No avulsion within or without the bed of the river occurred. In the case at bar a true avulsion occurred around a permanent mass of land.

The Petition must fall of its own weight unless there is a linking factual similarity between the two cases. Otherwise, any statement of the Master concerning an avulsion was unnecessary to the decision. Respondent submits that the cases are materially divergent on their facts and that the Master made no finding or ruling which was pertinent to, or in conflict with the ruling of the Court of Appeals in the case at bar.

ARGUMENT AGAINST GRANTING WRIT OF CERTIORARI.

There Is No Conflict Between the Case at Bar and Louisiana v. Mississippi.

The factual situation in the case at bar is clearly set forth by the Circuit Court of Appeals in its opinion (Appendix to Petition, pages A-4 through A-7), and in the opinion of the District Court reported in 232 Federal Supplement 944, at pages 997-999.

The area in controversy here developed as an Arkansas accretion bar in a bend of the Mississippi River, the main channel of which marked the boundary between the States of Arkansas and Tennessee. As early as the year 1930, the river began eroding deeply into the concave Tennessee Bank which was accompanied by a correnponding accretion to the Arkansas shore. As the bend narrowed and became more extreme by this process, it so menaced navigation that the U. S. Corps of Engineers, the agency charged with the maintenance of the channel, undertook the dredging of a new and distinct channel over and across the Arkansas accretion in an effort to sever it, and thus improve navigability.

For several years this project was unsuccessful and the river refused to leave its ancient and chosen channel known as the "Bendway". This undertaking finally succeeded in 1938 when the river abandoned its former channel (the "Bendway") and adopted as its main channel the new "Pointway Channel", prepared for it partly by dredging and partly by the natural scouring action of the floodwaters of the Spring of that year.

At the time the "Bendway Channel" was abandoned in favor of the 'Pointway Channel", the area in controversy, a sizeable land mass consisting of some 700 acres, was above the water at low and medium stages and hubmerged

by but 4 feet of water at ordinary highwater stage. The "Benway Channel" remained intact and was separated from the "Pointway Channel" by the area in controversy, which was severed from its parent Arkansas accretion bar by this new channel. Under these facts the District Court concluded and the Circuit Court of Appeals affirmed, that the change in channel was sudden and perceptible and, therefore constituted an avulsion and resulted in no change in public or private boundaries.

This Petitioner asks a review of that decision asserting that the opinion of the Circuit Court of Appeals for the Eighth Circuit is in irreconcilable conflict with the opinion of the Special Master approved by the Supreme Court in **Louisiana v. Mississippi,** 384 U. S. 24. A factual comparison of the cases discloses no similarity nor conflict.

In **Louisiana v. Mississippi,** the controversy concerned the location of the state line in the area of an oil pool. Prior to 1954, this pool lay on the west or Louisiana side of the thalweg of the Mississippi River. In 1955 the channel migrated westwardly passing over the oil well, which since that time has been located on the east or Mississippi side of the thalweg. Mississippi claimed the well contending that the movement of the river was gradual and by erosion at all times and that, as a consequence, the state line moved with the thalweg. Louisiana asserted continued ownership contending that an avulsion had occurred in this reach of the river during the floods of 1950 through 1952 and that, as a consequence, the state line became fixed and unaffected by the migrating channel. The issue, as in the case at bar, was whether the facts would disclose that an avulsion had occurred.

The record indicated that in about 1933 a man-made avulsion known as "Glasscock Cutoff" occurred upstream. Prior to that time, the erosion had been eastward into Mississippi, but subsequent to the avulsion the erosion had been westwardly into Louisiana. In 1950 through 1952,

there was a period of unusual highwater. Louisiana contended that these floods created a distinct avulsion by directing the flow of the channel within the banks of the river some 1,000 feet west of the existing channel, and, therefore, that the new channel "was created entirely separate from the old channel and in an avultive fashion" Master's Report at page 18).

It should be observed that there was no mass of land between the thalweg as located in 1950 and its location in 1952. There was, in fact, only deep water.

The Master rejected the contention that any avulsion occurred and found on these facts that the channel change was at all times gradual and imperceptible, and accordingly that the State line had moved by the process of erosion and accretion. There was no movement by any avultive process whatever. In the Master's Report, at page 20, he stated:

> "In the instant case there was a **gradual reversal** of the trend of **erosion** and **accretion** from one side of the river to the other. This reversed trend began not later than 1940 in the area directly below the foot of the cutoff and has continued at all times during that period from that date until 1964. It is true that a great portion of the reversed process occurred during the flood which began in 1950 and the prolonged highwater that continued through 1951 and a part of 1952. This is natural, for greater river action always occurs in periods of highwater. However, a close study of the hydrographic surveys for those years, 1932-1964, points out the **overall gradualness** of the change of the thalweg south of Glasscock Cutoff." (Master's Report, page 20. Emphasis supplied.)
>
> • • • • • • • •
>
> "The **gradual proces of erosion** whereby the channel was being forced to the west initially at the foot of the cutoff and increasing gradually downstream

was accelerated in the 1950-52 flood and highwater period. This resulted in the deepening of the water on the Louisiana side in an area below the well. By the time of the October 1952 survey, this accelerated process had ceased and while there were some rises thereafter, no unusual highwater for several years thereafter. Channel change was therefore gradual after October 1952, and is reasonable to assume a **constant rate of change** between that date and 1964." (Master's Report, page 24, Emphasis supplied.)

* * * * * * * *

"I conclude that in October 1952 the true thalweg or main navigable channel was one **gradually moving** from the deep water on the Louisiana side toward the deep water on the Mississippi side, * * *." (Master's Report, page 28.)

"At the same rate of movement toward the west the thalweg was directly over the bottom hold on February 27th, 1955. Therefore, on February 27th, 1965, the boundary was on the western side of the well and the well became located in Mississippi. I treat the boundary to have moved at this **constant rate ever since,** * * *." (Mater's Report, page 29, Emphasis supplied.)

This Court in its opinion approving the Master's Report emphasized the gradualness of the change:

"At all times between October 3, 1952, and April 10, 1964, the live thalweg has moved at a constant rate. The boundary location for any intervening period at any point in Deadman's Bend (from the foot of Glasscock Cutoff to range 334.5 AHP) is to be determined mathematically by calculating the constant rate of change for that particular place in Deadman's Bend, using the 1952 and 1964 thalwegs described heretofore and the appropriate time differentials." (**Louisiana v. Mississippi,** 384 U. S. 24 (1966).)

It is, therefore, clear that the factual conditions in **Louisiana v. Mississippi** were altogether different from those in the case at bar. It is equally as clear that the Master rejected Louisiana's contention **as a matter of fact** and not of law as petitioners urge.

The Master found that the movement of the channel was constant and gradual, and was not called upon to decide the question which would have been presented had Louisiana's contention that an avulsion occurred been supported by the facts.

The Master did not have before him a situation where the thalweg changed its location around a large area of land, and his comments are therefore inappropriate to the instant case. As stated by the Court of Appeals in its opinion on Page A12 of the Petition (footnote No. 5), the case of **Louisiana v. Mississippi** is "inapposite".

CONCLUSION.

For the reasons set forth herein, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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